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No. 86-1759

In The

Supreme Court of the United States

October Term, 1986

KENNETH WOOD, et al,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, LOCAL 406, et al,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

There are six questions presented for review by this Court. Questions one, two and five pertain to Respondent, Local 406. Questions three and four pertain to Respondent, Kroger. Question six pertains to Hamady and is the only one addressed in this Brief. That question is restated more appropriately for review as:

Under what circumstances can a succeeding employer be liable for any of the substantive provisions of its predecessor's agreements?

DISCLOSURE OF CORPORATE AFFILIATIONS

Pursuant to Sup. Ct. R. 28.1, Respondent Hamady Bros. Food Markets, Inc. makes the following disclosure:

Respondent, Hamady Bros. Food Markets, Inc., is a Michigan corporation, and has no subsidiaries or affiliates. It is not publicly owned and no publicly owned corporation has a financial interest in the outcome of this litigation.

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COUNTER-STATEMENT OF THE CASE

Petitioners' statement of the case is in error in the following two particulars:

1. Petitioners state "In October, 1980, Kroger turned over operation of the warehouse to Hamady Bros. Food

Markets, Inc." Kroger did not "turn over" anything to Hamady. Hamady purchased the assets of 21 of 35 supermarkets of Kroger that were serviced by a warehouse in Kentwood, Michigan. In conjunction with these asset purchases, Hamady later agreed to purchase the real estate interest and inventory at the warehouse that serviced these 35 supermarkets.

2. In footnote 1, Petitioners state that Kroger and *Hamady* filed motions to strike plaintiffs' jury demand. Although Hamady's position has always been that plaintiffs were not entitled to a jury trial on the successorship issue, it was Kroger and *Local 406* that filed motions to strike plaintiffs' jury demand.

SUMMARY OF ARGUMENT

The obligation of a "successor" vis-a-vis the predecessors labor agreement is very fact specific and may take form in various duties. The successor may have a duty to recognize and bargain with the union or it may have a duty to arbitrate the effect of the transfer. The transfer agreements between Kroger and Hamady involved a straight sale of assets. There was no merger or other stock transaction. Kroger did not disappear. The agreement on the warehouse required Hamady to purchase the warehouse within 7 years; it was in the nature of a land contract with a required "balloon payment". Hamady and Kroger are totally unrelated corporate entities. Hamady hired 99 of the warehouse employees (51% of the prior Kroger workforce). Hamady bargained with the union

and negotiated a new contract. It did not have a concurrent burden of being involuntarily bound to the substantive terms of Kroger's collective bargaining agreement.

ARGUMENT

The Sixth Circuit approved of the District Court's finding that as a general rule unless the successor agrees to assume the existing collective bargaining agreement, it does not bind the successor in any manner. *Kenneth Wood, et al v. International Brotherhood of Teamsters, et al,* 807 F.2d 493, 498 (6th Cir. 1986). It went on to discuss and decide each of the three exceptions in Hamady's favor. It summarily disposed of the first and second exceptions, i.e., that Hamady was not the "alter ego" of Kroger and Hamady did not expressly or impliedly assume the contract. Petitioners concede the appropriateness of this ruling by not raising those issues in this court. It is the third exception with which they disagree, i.e., the "substantial continuity" of business enterprise.

Petitioners argue the Sixth Circuit decision in this case conflicts with decisions by other circuits as to "the relevant criteria for evaluating continuity." That is not true. Petitioners ignore the fact that a successor employer's obligation may take form in a variety of duties being imposed on it. There may be a duty to recognize and bargain with the union which represented the employees of the predecessor. This duty was recognized in *NLRB v. Burns International Security Services, Inc.,* 406 U.S. 272 (1972). *See also Fall River Dyeing & Finishing Corp. v.*

NLRB, No. 85-1208, slip op. (U.S. June 1, 1987). The successor, under other circumstances and a different set of facts, may be bound to arbitrate the effect of a transfer on the collective bargaining agreement. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543 (1964); *Howard Johnson Co. v. Detroit Local Joint Exec. Bd.*, 417 U.S. 249 (1974). The separate nature of these obligations depends on the facts of each case. This was recognized by the district court when it observed that the application of the "substantial continuity" test is fact specific. See page 29a of Petitioners' Appendix. It was recognized by the Sixth Circuit, 807 F.2d at 500, and more importantly this Court too has already determined that the analysis of a successorship case and the applicable principles are different, depending on *which* duty is to be imposed on a "successor":

> The question whether (a new employer) is a "successor" is simply not meaningful in the abstract . . . [T]he real question in each of these "successorship" cases is, on the particular facts, what are the legal obligations of the new employer to the employees of the former owner or their representative? *The answer to this inquiry requires analysis* of the interest of the new employer and the employees and the policies of the labor laws *in light of the facts of each case and the particular legal obligation which is at issue, whether it be the duty to recognize and bargain* with the union, the duty to remedy unfair labor practice, the duty to arbitrate, etc. There is, and can be, no single definition of "successor" which is applicable in every legal context. A new employer, in other words, may be a successor for some purposes and not for others.

Howard Johnson, 417 U.S. 249, 262, n. 9 (emphasis added).

It is crucial to recognize the separate nature of the above obligations. A successor's obligation to bargain does

not create a concurrent burden of being bound involuntarily to the substantive terms of its predecessor's collective bargaining agreement. *Burns,* at 291. Petitioners refuse to accept this distinction and continue to argue that under all circumstances a "successor" is bound by the predecessor's labor agreement.

Because Hamady hired its employees from the Kroger work force and because its operations at the warehouse were similar to those of Kroger, Hamady concededly was obligated to bargain with the Union that represented those employees. *Burns,* at 291. *See also Fall River,* at 12. Hamady, of course, did this and, in fact, reached an agreement with Local 406 on a new contract. Petitioners' Appendix at 24a-25a. Accordingly, that question—whether Hamady had an obligation to recognize and bargain with the Union—is not the issue. Although Petitioners apparently do not dispute this history, they continue to cite cases to this Court that rely on precedents dealing with whether a "successor" is obligated to *bargain* with the Union which represented its predecessor's employees in deciding whether an employer is *bound by the terms* of his predecessor's labor contract. Petitioners, using this reasoning, then argue there is a conflict with decisions by other Circuits. Petitioners then argue for this Court to borrow from these precedents as evidence of this "conflict" by other Circuits. This Court should not base its analysis on any duty to bargain precedents the Petitioners have cited. The real issue is not whether Hamady is a successor in terms of its duty to bargain, but whether Hamady, *as* successor, is obligated to assume the prior labor contract.

Petitioners have cited cases they claim to be at odds with the Sixth Circuit. *United Steelworkers of America*

v. Reliance Universal, Inc., 335 F.2d 891 (3rd Cir. 1964) was decided before *Burns* or *Howard Johnson* and does not represent that Circuit's post *Howard Johnson* position. In *Reliance*, Martin Marietta divested itself of an *entire* plant including "all machinery, equipment, raw material, reserves, trade names, contract rights, trade marks, and goodwill". *Id.* at 893. Martin Marietta sold its Bridgeville plant to Reliance as a "going concern". Accordingly, the *Reliance* court found a duty on Reliance to arbitrate grievances under the labor contract, but not to be involuntarily bound to its substantive provisions. Here, Kroger sold only the assets at its Kentwood facility; it was not transferred as a "going concern".

United Steelworkers of America v. United States Gypsum Co., 492 F.2d 713 (5th Cir. 1974) *aff'd on rehearing*, 498 F.2d 334, *cert. denied* 419 U.S. 998 (1974) was also decided before *Howard Johnson* and was denied for rehearing in a quarter page *per curium* opinion. 498 F.2d 334 (1974). In *Gypsum*, the successor hired "all but three" of its predecessor's employees (492 F.2d at 816); here Hamady hired a bare majority of 51%. Further, in *Gypsum*, the predecessor apparently disappeared as "all of its assets and property" were purchased. *Id.* Thus, *Gypsum*, like *Wiley*, is a case where, although not a merger, the predecessor disappeared and there was a "wholesale transfer of employees". Imposition of the contract against the successor was the only way for the *Gypsum* court to give any remedy. Here, Kroger remained a viable corporate entity. The Petitioners had an arbitral remedy against Kroger under the "successor" clause. See *Burns, supra.* The Petitioners arbitrated their grievances wherein they were represented by counsel of their own choosing. It was not neces-

sary to involuntarily force the labor contract on Hamady to provide Petitioners with a remedy. *Gypsum* does not represent a conflict between Circuits in the application of successorship principles.

The holding in *Boeing Co. v. International Association of Machinists & Aerospace Workers,* 504 F.2d 307 (5th Cir. 1974) is consistent with *Wiley, Burns* and *Howard Johnson.* Even in an arms length transaction a successor cannot be bound to its predecessor's contract simply by hiring a large enough portion of its predecessor's work force. *Wiley, Burns* and *Howard Johnson* allow this to happen only when the relationship between the predecessor and successor is one which would normally lead, under state law principles, to the imposition of the predecessor's obligations on the successor. Under Michigan law, a purchaser of assets is *not* so obligated. *Chase v. Michigan Telephone Co.,* 121 Mich. 631, 80 N.W. 717 (1899). Both circumstances must exist, i.e., state law requiring the successor to assume the general contractual obligations of the predecessor employer AND substantial continuity in the identity of the business enterprise.

General Teamsters Local No. 249 v. Bill's Trucking, Inc., 493 F.2d 956 (3rd Cir. 1974) is distinguishable because that case involved a sale of stock and not a sale of assets. In a stock transfer the employing entity remains the same after the sale. Also in a stock transfer there is no break, or hiatus, between the two legal entities. As the Court in *Bill's Trucking* said:

> "This is not to suggest, of course, that in every case a successor employer may properly be held to the provisions of his predecessor's labor contract." *Id.* at 963.

There is no uncertainty in the law of successorship, as Petitioners suggest, and there really is no conflict in its application by different Circuits. The conflict *appears* to arise because the facts of each case are different and "the application of the 'substantial continuity' test is extremely fact specific". Petitioners' Appendix at 29a. Also the duty to be imposed upon the succeeding employer is different.

Petitioners suggest the time is appropriate for this Court to revisit the issue of successorship because it has been 13 years since having done so. There are two reasons that is not true. First, the circumstances and facts of this case suggest there are no important reasons for granting certiorari. The facts of this case, evaluated under the trilogy of *Wiley, Burns* and *Howard Johnson,* lead to the clear and unmistakable conclusion that Hamady had a duty to bargain with Local 406 and they did just that. They had no duty to arbitrate nor to be involuntarily bound by the substantive provisions of Kroger's collective bargaining agreement with Local 406. Secondly, this Court recently revisited the successorship issue. In *Fall River, supra,* the buyer acquired assets of the seller and did part of the seller's former dyeing work. The buyer was comprised of one of the seller's former officers and one of its major customers. The buyer took advantage of the seller's assets and its work force. The buyer acquired the seller's plant, real property, equipment and some of its remaining inventory. The buyer hired 8 of 12 of seller's supervisors and 36 of 55 production workers for one shift of operation. Months later the buyer expanded to two full shifts. The same working conditions existed for the employees and over half of the buyer's business came from the seller's

customers. The buyer refused to recognize and bargain with the union and an unfair labor practice charge was filed. An Administrative Law Judge found the buyer to be a successor with a duty to bargain with the union. The National Labor Relations Board affirmed the Administrative Law Judge's decision, the Court of Appeals for the First Circuit enforced the Board's order and this Court affirmed. In doing so this Court revisited its *Burns* decision and said:

> We observed in *Burns* that, although the successor has an obligation to bargain with the union, it "is ordinarily free to set initial terms on which it will hire the employees of a predecessor," 406 U.S., at 294, and it is not bound by the substantive provisions of the predecessor's collective-bargaining agreement. *Id.* at 294
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> If the new employer makes a conscious decision to maintain generally the same business and to hire a majority of its employees from the predecessor, then the bargaining obligation of § 8(a)(5) is activated.
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> • • •
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> We now hold that a successor's obligation to bargain is not limited to a situation where the union in question has been recently certified. Where, as here, the union has rebuttable presumption of majority status, this status continues despite the change in employers. And the new employer has an obligation to bargain with that union so long as the new employer is in fact a successor of the old employer and the majority of its employees were employed by its predecessor. (footnote omitted) Slip Op. at 12-13.

Hamady does not contest this obligation and did recognize, bargain and reach an agreement with Local 406.

Wiley, Burns and *Howard Johnson* have clearly established successorship as a two-step process. The paramount criterion is the continuity of the work force. If there is no continuity, there is no duty to even bargain with the Union because without continuity there can be no successor. *Howard Johnson, supra.* However, just because a successorship is determined to exist does not mean that the successor must assume the obligations of the predecessor's labor contract. This Court has established the general rule that even because of continuity of the work force, a corporation is determined to be a successor and, therefore, obligated to bargain with the Union, this obligation does not extend to being bound involuntarily to the substantive terms of its predecessor's labor agreement.

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CONCLUSION

Petitioners' failure to understand the firmly established principles set forth by this Court does not create a conflict by Circuits in its application. Under the guidelines of *Wiley, Burns* and *Howard Johnson,* a distinguished arbitrator in an advisory opinion found Hamady was not bound by the substantive provisions of the Kroger-Local 406 agreement as did the District Court and the Sixth Circuit Court of Appeals. There does not seem to be any misunderstanding in the application of those three cases. On this basis, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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